Supreme Court, U.S.
FILED

02 811 NOV 22 2002

OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

JEFF GROH, Special Agent with the
Bureau of Alcohol, Tobacco, and Firearms,

Petitioner,

v.

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ,
JOSHUA RAMIREZ, and REGINA RAMIREZ,

Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorney for Petitioner

61 pp

QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly ruled that a law enforcement officer violated clearly established law, and thus was personally liable in damages and not entitled to qualified immunity, when at the time he acted there was no decision by the Supreme Court or any other court so holding, and the only lower court decisions addressing the issue had found the same conduct did not violate the law?

2. Whether law enforcement officers violate the particularity requirement of the Fourth Amendment when they execute a search warrant already approved by a magistrate judge, based on an attached application and affidavit properly describing with particularity the items to be searched and seized, but the warrant itself does not include the same level of detail?

PARTIES TO THE PROCEEDING

The petitioner, Jeff Groh, is a federal law enforcement official who served at the time as a special agent of the United States Bureau of Alcohol, Tobacco, and Firearms. The County of Butte-Silver Bow, Montana; John McPherson, the county sheriff; Joe Lee, the county undersheriff; and various John Does were also named as defendants, but they have been dismissed from the case and are not parties to this petition. The petitioner is an individual, and so there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

Joseph R. Ramirez, Julia L. Ramirez, Joshua Ramirez, and Regina Ramirez are the plaintiffs in this case, and they were the appellants in the court below.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

A. The Search Warrant and Its Execution 3

B. The District Court Proceedings 4

C. The Decision by the Court of Appeals 5

REASONS FOR GRANTING THE WRIT 6

I. THE NINTH CIRCUIT BROKE WITH COURT PRECEDENT BY HOLDING THAT PETITIONER VIOLATED CLEARLY ESTABLISHED LAW AT A TIME WHEN NO CONTROLLING DECISION SO HELD AND THE COURTS HAD RULED HIS CONDUCT LAWFUL 7

TABLE OF CONTENTS (cont.)

PAGE

II. THE CIRCUITS ARE SPLIT ON WHETHER OFFICERS VIOLATE THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT BY EXECUTING A WARRANT APPROVED BY A COURT BASED ON AN ATTACHED AFFIDAVIT WHERE THE WARRANT DOES NOT CONTAIN THE SAME LEVEL OF DETAIL 10

CONCLUSION 16

TABLE OF AUTHORITIES

PAGE

Cases

Anderson v. Creighton, 483 U.S. 635 (1987) 1, 7, 9
Bartholomew v. Pennsylvania,
221 F.3d 425 (3d Cir. 2000) 14
Behrens v. Pelletier, 516 U.S. 299 (1996) 10
Bivens v. Six Unknown Named Agents,
403 U.S. 388 (1971) 4
Christopher v. Harbury, 122 S. Ct. 2179 (2002) 11
County of Sacramento v. Lewis, 523 U.S. 833 (1998) . 10, 11
Davis v. Scherer, 468 U.S. 183 (1984) 9
Elder v. Holloway, 510 U.S. 510 (1994) 9
Hanlon v. Berger,
526 U.S. 808 (1999) (per curiam) 1, 7, 8, 10
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 1, 7, 9
Hunter v. Bryant,
502 U.S. 224 (1991) (per curiam) 1, 10
Malley v. Briggs, 475 U.S. 335 (1986) 9, 16
Massachusetts v. Sheppard, 468 U.S. 981 (1984) . 12, 13, 15
Mitchell v. Forsyth, 472 U.S. 511 (1985) 9
Procunier v. Navarette, 434 U.S. 555 (1978) 1, 9, 16
Saucier v. Katz, 533 U.S. 194 (2001) 1, 7, 8, 10
Scheuer v. Rhodes, 416 U.S. 232 (1974) 9
Siegert v. Gilley, 500 U.S. 226 (1991) 11
United States v. Beaumont,
972 F.2d 553 (5th Cir. 1992) 12
United States v. Cherna, 184 F.3d 403 (5th Cir. 1999),
cert. denied, 529 U.S. 1065 (2000) 12, 13
United States v. Dahlman,
13 F.3d 1391 (10th Cir. 1993) 13
United States v. Hillyard,
677 F.2d 1336 (9th Cir. 1982) 10
United States v. Leon, 468 U.S. 897 (1984) 5, 11, 13, 15
United States v. McGrew,
122 F.3d 847 (9th Cir. 1984) 5, 8, 13, 14

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

United States v. Ortega-Jimenez,
232 F.3d 1325 (10th Cir. 2000) 13
United States v. Shugart, 117 F.3d 838 (5th Cir.),
cert. denied, 522 U.S. 976 (1997) 12
United States v. Simpson,
152 F.3d 1241 (10th Cir. 1998) 13
United States v. Thomas, 263 F.3d 805 (8th Cir. 2001),
cert. denied, 534 U.S. 1146 (2002) 14
United States v. Towne,
997 F.2d 537 (9th Cir. 1993) 8
Wilson v. Layne, 526 U.S. 603 (1999) 1, 7, 8, 11

Constitutional Provisions, Statutes, and Rules

U.S. CONST. amend. IV ..... *passim*
28 U.S.C. § 1254(1) 2
42 U.S.C. § 1983 4

INTRODUCTION

Petitioner respectfully requests a writ of *certiorari* to review the judgment entered by the United States Court of Appeals for the Ninth Circuit in this proceeding.

The ruling below sharply undermines the defense of qualified immunity that the Court has extended to federal, state, and local officials. The Court has consistently stressed that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Before an official may be stripped of the defense of qualified immunity, the contours of the constitutional right alleged to be violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," which means that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The Ninth Circuit seriously misapplied this Court's precedents when it reversed the district court's judgment that petitioner was entitled to qualified immunity.

At the time petitioner acted, no controlling decision and no decision by *any* court had ruled that his actions were unlawful. Indeed, the lower courts had upheld the lawfulness of such conduct. In this situation, it was egregious error for the Ninth Circuit to invalidate the defense of qualified immunity. Indeed, on the basis of the square holdings in *Wilson v. Layne*, 526 U.S. 603, 614-18 (1999), and *Hanlon v. Berger*, 526 U.S. 808, 810 (1999) (per curiam), the ruling below should be summarily reversed. This disposition would strongly reaffirm the Court's admonition that officers "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978); *see also Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam) (summarily reversing Ninth Circuit holding that erroneously denied qualified immunity); *Saucier v. Katz*, 533 U.S. 194 (2001) (reversing Ninth Circuit holding that erroneously denied qualified immunity).

Moreover, the lower federal courts are divided on the specific constitutional issue underlying the defense of qualified immunity raised in this case. Like the District Court here, the Fifth, Eighth, and Tenth Circuits have found no violation of the Fourth Amendment where law enforcement officers have executed a search warrant already approved by a magistrate judge, based on an attached application and affidavit properly describing with particularity the items to be searched and seized, even though the warrant itself does not include the same level of detail. In reversing the District Court, the Ninth Circuit rejected these decisions and sided instead with the Third Circuit, which has found a constitutional violation in these circumstances. Nonetheless, even that court went on to uphold qualified immunity, in square conflict with the decision below. If the Court does not summarily reverse, therefore, it should grant *certiorari* to resolve the circuit conflict on the Fourth Amendment issue that is cleanly presented in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, which is reported as *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022 (9th Cir. 2002), is reprinted in the Appendix to this petition ("Pet. App.") at 1a-12a. The Ninth Circuit's opinion reversed an order and opinion of the United States District Court for the District of Montana, which had granted summary judgment to uphold petitioner's defense of qualified immunity. The District Court's opinion is unreported and is reprinted at Pet. App. 13a-25a. The Ninth Circuit denied a timely petition for rehearing and suggestion of rehearing *en banc*. *Id.* at 3a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit denied rehearing and rehearing *en banc* on July 25, 2002. Pet. App. 3a. The Court granted a timely request for extension of the time within which to file a petition for certiorari, which was extended to and including November 22, 2002. *See id.* at 36a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

A. The Search Warrant and Its Execution.

This lawsuit stems from an investigation of respondents by the United States Bureau of Alcohol, Tobacco and Firearms. The investigation occurred after federal officials received complaints and information from concerned citizens who indicated that the Ramirez family was violating federal law by possessing and using unlawful weaponry at their ranch in western Montana. *See* Pet. App. 3a-4a, 13a-15a.

The petitioner in this case is Jeff Groh, who serves as a special agent for the Bureau. In May 1996, petitioner received two reports that the Ramirezes kept automatic weapons and grenades on their ranch. *See id.* at 14a. Petitioner met with Mr. Ramirez, who showed him around the premises; no illegal weapons were in evidence, and the visit ended amicably. *See id.* In February 1997, petitioner was contacted by the undersheriff for the county, who passed on a report that the Ramirez family had automatic weapons, grenades, a grenade launcher, and a rocket launcher on their property. *See id.* at 14a-15a.

In an effort to obtain evidence concerning these allegations, petitioner sought a warrant to search the Ramirez property. He prepared an application for a search warrant and supporting affidavit, and presented them to a magistrate judge who issued the warrant. The application properly described both the place

to be searched and the objects sought, which consisted of "automatic firearms" and specified "destructive devices," including grenades, grenade launchers, and rocket launchers. Nonetheless, the warrant itself omitted the latter information: in the space provided to list the items to be seized, Groh mistakenly typed a description of the Ramirez home. *See id.* at 15a.

On March 4, 1997, petitioner accompanied other agents from the Bureau, along with the county sheriff and members of the county sheriff's department, to the Ramirez ranch in order to execute the warrant. When the officers entered the home, only Mrs. Ramirez was present. Petitioner told her they had a search warrant and were there "because somebody called and said you have an explosive device in a box." *Id.* at 4a. He also orally described to Mrs. Ramirez (in person) and to Mr. Ramirez (on the telephone) the specific items that were the objects of the search. *See id.* at 15a. The officers found no illegal weapons or explosives, but photographed the home's interior and recorded the serial numbers of the legal firearms that they found there. Mrs. Ramirez tried to call her attorney during the search but could not reach him. As the officers left, petitioner gave Mrs. Ramirez a copy of the search warrant without the application or the affidavit. Nothing was seized, and no charges were ultimately filed against respondents. *See id.* at 4a, 15a.

The next day, Mrs. Ramirez faxed the warrant to her attorney, who called petitioner and questioned the warrant's validity because of the omitted information. He also demanded a copy of the warrant application and supporting affidavit. Petitioner replied that the documents were under court seal, but faxed him the page of the application that contained the list of items to be seized. *See id.* at 15a.

B. The District Court Proceedings.

The Ramirezes sued petitioner and the other officers who participated in the search under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) and 42 U.S.C. § 1983, alleging the violation of their rights under the First, Fourth, Fifth, and Ninth Amendments and under Montana law. The principal *Bivens*

claim was that the officers violated the Fourth Amendment by undertaking a search of the Ramirez property pursuant to a defective search warrant. *See* Pet. App. 2a. Petitioner and the other defendants moved to dismiss all of the claims, or in the alternative for summary judgment, raising the defense of qualified immunity. *See id.* at 13a-14a.

The District Court treated the motion as one for summary judgment and ruled for the defendants. The court held that there was no constitutional violation and, in the alternative, upheld the defense of qualified immunity. The court correctly recognized that to analyze the qualified immunity defense, it "must first consider whether a constitutional violation occurred. Only if a violation occurred does the analysis progress to question whether the right was clearly established at the time of the violation." Pet. App. 19a. The court concluded that there was *no* authority – binding or otherwise – holding that petitioner's conduct violated the Fourth Amendment at the time he had acted and, in addition, that his conduct was objectively reasonable. *See id.* at 22a-23a. Respondents' remaining constitutional and state-law claims were also dismissed. *See id.* at 23a-24.

C. The Decision by the Court of Appeals.

With respect to every defendant other than petitioner, the Ninth Circuit affirmed. With respect to petitioner, however, the court of appeals reversed, holding that he had violated respondents' rights under the Fourth Amendment and was not entitled to qualified immunity. On the constitutional issue, the court relied on its decision in *United States v. McGrew*, 122 F.3d 847 (9th Cir. 1997), which did not even issue until months after the search warrant was executed in this case, and declined to apply this Court's decision in *United States v. Leon*, 468 U.S. 897 (1984), which had recognized a "good faith" exception to the Fourth Amendment where officers execute a search warrant that was previously approved by a judicial officer, as was true here. *See* Pet. App. 4a-5a.

The Ninth Circuit's subsequent decision in *McGrew* also was cited to support the court's ruling adverse to petitioner on

qualified immunity. *See id.* at 9a. The court paid no attention to the timing of this ruling, and instead emphasized its own factual assessment that petitioner was the "leader" of the search. In the court's view, this meant that before petitioner helped execute the search warrant, he had a distinct obligation to reread it to discover any flaws lurking in its terms, even after it had already been approved by a judicial officer. *See id.* at 8a-10a. In the court's judgment, petitioner's failure to do so made his conduct in executing the warrant "objectively unreasonable" and stripped him of any defense of qualified immunity. *See id.*

A timely petition for rehearing was denied with minor amendments to the panel opinion, *see id.* at 3a, and this petition for *certiorari* followed.

REASONS FOR GRANTING THE WRIT

This petition raises an issue that arises frequently in the lower courts and that is crucial to preserving the objectives served by the defense of qualified immunity: how should courts evaluate a defense of qualified immunity when there is no binding authority from the Supreme Court or the Court of Appeals to resolve the issue of whether the law was clearly established at the time of the acts in question? In particular, where the lower courts had held that essentially the same conduct was *lawful* at the time, is it proper for a court to reject a defense of qualified immunity and can such a ruling be squared with the Court's precedents? Petitioner suggests that the correct answer is clearly in the negative, and that the Court's precedents directly mandate a summary reversal in this case on the issue of qualified immunity.

In addition, the lower courts are now squarely divided on the underlying constitutional issue posed in this case: whether law enforcement officers violate clearly established law under the Fourth Amendment, thus invalidating their defense of qualified immunity, when they execute a warrant that was approved by a judicial officer but lacks the same level of detail that was provided in the application and supporting affidavit. The Ninth Circuit has sided with the Third Circuit, against the Fifth, Eighth and Tenth Circuits, by finding a constitutional

violation on the facts of this case. This division in authorities is tremendously significant for law enforcement officials, whose recurring duties include the execution of warrants that have been approved by a judicial officer even though they may include textual errors and may be issued in reliance upon other supporting documents. Moreover, the chill that would be cast on all law enforcement activity by requiring officers to gauge future developments in constitutional jurisprudence on pain of personal liability for money damages – even in situations where they acted in good-faith reliance on prior judicial approval of the terms of a warrant – is intolerable and cannot be reconciled with the purposes of qualified immunity.

I. THE NINTH CIRCUIT BROKE WITH COURT PRECEDENT BY HOLDING THAT PETITIONER VIOLATED CLEARLY ESTABLISHED LAW AT A TIME WHEN NO CONTROLLING DECISION SO HELD AND THE COURTS HAD RULED HIS CONDUCT LAWFUL.

The ruling below departs radically from the doctrine of qualified immunity that the Court has extended to state and local officials. The Court has consistently held that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See Harlow*, 457 U.S. at 818. To defeat a defense of qualified immunity, the contours of the constitutional right alleged to be violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," which requires that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640. The core issue in this case is whether a court can properly deny qualified immunity when no controlling authority from the Supreme Court or the relevant lower court of last resort has addressed the specific legal issue at stake. Under the Court's uniform line of recent rulings, a court clearly cannot do so. *See, e.g., Saucier*, 533 U.S. at 201; *Wilson*, 526 U.S. at 617; *Hanlon*, 526 U.S. at 810.

Here, the Ninth Circuit squarely and seriously misapplied the Court's precedents. In refusing to extend qualified immunity to petitioner, the court below purported to rely on its *McGrew* decision, which did not even issue until months after the underlying events in this case had occurred. *See* Pet. App. 9a. Indeed, at the time petitioner acted, the *only* judicial decision on point in the Ninth Circuit was the *District Court's* ruling in *McGrew*, which had *upheld the validity* of the challenged search in the course of upholding the defendant's criminal conviction. At best, the question of whether an unincorporated affidavit could be considered in deciding whether the good faith exception to the exclusionary rule applied was an open question in the Ninth Circuit on March 4, 1997, when petitioner executed the search warrant in this case. *See, e.g., United States v. Towne*, 997 F.2d 537, 547-50 (9th Cir. 1993) (rejecting a "flat rule" that a supporting affidavit must be physically attached to a warrant because the Constitution does not "draw the line between lawful and unlawful searches according to the presence or absence of a staple, a paper clip, a bit of tape, or a rubber band," and suggesting the "good faith" doctrine may apply even where warrant does not incorporate affidavit by reference); *United States v. Hillyard*, 677 F.2d 1336 (9th Cir. 1982) (holding that search warrant may be construed with reference to accompanying application, but not requiring application to accompany warrant in all cases).

In fact, at the time petitioner acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that his actions were unlawful. In this posture, the Ninth Circuit could not legitimately invalidate the defense of qualified immunity. *See, e.g., Saucier*, 533 U.S. at 201; *Wilson*, 526 U.S. at 617; *Hanlon*, 526 U.S. at 810. Here the District Court analyzed the issue in these terms, but the Ninth Circuit failed to do so. *Compare* Pet. App. 22a-24a *with id.* at 7a-10a.

Nor may a court in this situation saddle public officials with personal liability in money damages merely because the court is adamantly persuaded that its own legal judgments should have been obvious on their face to everyone. Government officials lose the shield of qualified immunity only when the

unconstitutionality of their conduct would have been apparent "in the light of pre-existing law." *Anderson*, 483 U.S. at 640; *Harlow*, 457 U.S. at 818; *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In this case, moreover, the merits of the underlying Fourth Amendment issues are not obvious, even today, to many judges who are vested with the authority to address them. *See infra* Part II.

In this situation, the doctrine of qualified immunity is designed to allow public officials to carry out their responsibilities with "the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). Only by faithful application of the settled principles established by this Court can law enforcement officers "reasonably anticipate when their conduct may give rise to liability for damages" and tailor their behavior accordingly. *Davis v. Scherer*, 468 U.S. 183, 195 (1984). Without steady application of these principles, officers will be subjected to "undue interference with their duties" and "potentially disabling threats of liability." *Elder v. Holloway*, 510 U.S. 510, 514 (1994).

Summary reversal is therefore warranted in this case, and would strongly reaffirm the Court's previous admonition that public officials "cannot be expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at 562. Indeed, the Court has not been reluctant to use the mechanism of summary reversal to overturn prior Ninth Circuit rulings that mishandled the qualified immunity issue, emphasizing again that "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter*, 502 U.S. at 229 (quoting *Malley*, 475 U.S. at 343, 341).

The importance of close adherence to these principles in an area where the Court has stressed that qualified immunity is an "*immunity from suit* rather than a mere defense to liability," which is "effectively lost if a case is erroneously permitted to go to trial," is manifest. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original). And, again, that is especially so

where, as here, this particular lower court has so frequently departed from the Court's precedents in this area. *See, e.g.*, *Hunter*, 502 U.S. at 229 (summary reversal of Ninth Circuit decision misapplying law on qualified immunity); *see also Hanlon*, 526 U.S. at 810 (*per curiam* reversal of Ninth Circuit ruling that wrongly denied qualified immunity to law enforcement officers); *Saucier*, 533 U.S. at 201 (reversing Ninth Circuit holding that erroneously denied qualified immunity); *cf. County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (reversing on substantive constitutional grounds Ninth Circuit holding that erroneously denied qualified immunity); *Behrens v. Pelletier*, 516 U.S. 299 (1996) (reversing on procedural grounds Ninth Circuit holding that erroneously denied qualified immunity).

II. THE CIRCUITS ARE SPLIT ON WHETHER OFFICERS VIOLATE THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT BY EXECUTING A WARRANT APPROVED BY A COURT BASED ON AN ATTACHED AFFIDAVIT WHERE THE WARRANT DOES NOT CONTAIN THE SAME LEVEL OF DETAIL.

The circuit courts of appeals are also divided on the specific constitutional issue that underlies the defense of qualified immunity raised in this case: whether law enforcement officers violate the particularity requirement of the Fourth Amendment by executing a warrant that was approved by a court based on an attached application and affidavit that are sufficiently particular, where the warrant itself does not contain the same level of detail.

Like the District Court here, the Fifth, Eighth, and Tenth Circuits have found that law enforcement officers do not violate the Fourth Amendment by executing a warrant in these circumstances. In reversing the District Court, the Ninth Circuit cast its lot instead with the Third Circuit, which has found a constitutional violation on similar facts. Even the Third Circuit, however, has been unwilling to go so far as to deny a defense of qualified immunity in this situation. Instead, it correctly adhered to this Court's analogous precedents applying the "good faith"

doctrine in *Leon* and its progeny and thus determined that officers cannot be held personally liable in damages for executing a warrant in this situation. If the Court does not summarily reverse, therefore, it should grant *certiorari* to resolve the clear circuit conflict presented here on the underlying Fourth Amendment issue.[1]

The District Court here applied a line of cases building on this Court's "good faith" doctrine, as initially laid down in *Leon*, to conclude that the Fourth Amendment was not violated. It described the facts here as "comparable to cases in which warrants contain inaccurate addresses. Such warrants do not necessarily violate the Constitution; a violation occurs only if the premises is not sufficiently described to enable officers to locate the correct address or if there is a reasonable probability that the officers will search the wrong house." Pet. App. 22a (citing cases). The court noted that it was undisputed in this case that petitioner "immediately faxed Plaintiffs' counsel the face page of the application, showing the correct description of items to be seized, when he was notified of the mistake," which further evidenced his good faith. *Id.* at 21a. The court also noted the presence of additional key undisputed facts: (i) the description in the application was not overbroad; (ii) respondents knew what items the officers sought; and (iii) the officers participating

---

[1] The Court has now repeatedly explained its methodology in qualified immunity cases, under which courts "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Wilson*, 526 U.S. at 609; *Lewis*, 523 U.S. at 841 n.5; *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Accordingly, there is no procedural hurdle to the Court's consideration of the Fourth Amendment issue if it decides to grant plenary review in this case, since that issue would be decided first and, if petitioner were to prevail on the constitutional issue, it would be unnecessary to reach the qualified immunity issue at all. *See, e.g., Christopher v. Harbury*, 122 S. Ct. 2179 (2002) (resolving qualified immunity case by deciding only constitutional due process issue); *Lewis*, 523 U.S. at 839-55 (same).

in the search clearly knew what they were looking for. *See id.* at 21a-22a.

The Fifth Circuit's decision in *United States v. Cherna*, 184 F.3d 403 (5th Cir. 1999), *cert. denied*, 529 U.S. 1065 (2000), embraces the same position. There the defendant in a criminal proceeding complained that the search warrant was insufficiently particular, and that the defect was not cured by a related affidavit that was not attached to the warrant. The court rejected this argument, relying principally on *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), a companion case to *Leon*, which the Fifth Circuit described as "[t]he seminal Supreme Court case on particularity and the good-faith exception." *Cherna*, 184 F.3d at 411. In the end, the court held that "the warrant in this case was not so lacking in particularity that the executing officers could not reasonably presume it to be valid" because:

> . . . the issuing judge in this case made a probable cause determination, the affidavit explained in detail the alleged mail and wire fraud scheme that was the target of the investigation and search, the officer in charge of the search . . . was the affiant, and . . . [e]ven assuming that the absence of the affidavit rendered the warrant constitutionally defective, this defect could have been corrected with only minor corrections, such as the attachment of the affidavit.

Id. at 412. In these circumstances, the "Fourth Amendment does not demand that the executing officers question [the issuing judicial officer's] decision and determine for themselves whether the warrant is, in fact, valid." *Id.* (citing *Sheppard*, 468 U.S. at 989-90). Other Fifth Circuit precedents are in accord. *See, e.g., United States v. Shugart*, 117 F.3d 838, 845-46 (5th Cir.), *cert. denied*, 522 U.S. 976 (1997) (officers reasonably could rely on warrant that was insufficiently particular on its face and did not incorporate affidavit on which it was based, and officers in that situation would be able to assert their good faith); *United States v. Beaumont*, 972 F.2d 553, 560-61 (5th Cir. 1992) (same).

In *Cherna*, indeed, the Fifth Circuit expressly noted the disharmony between its approach and the Ninth Circuit's approach in *McGrew*, which was further reinforced and elaborated in the decision below. *See Cherna*, 184 F.3d at 413 (citing *McGrew* with disapproval as holding that if the "'affidavit does not accompany the warrant, agents cannot claim good faith reliance on the affidavit's contents'") (quoting *McGrew*, 122 F.3d at 850).

The Fifth Circuit in *Cherna* also had cited the Tenth Circuit as taking a contrary position more akin to the Ninth Circuit's approach. *See Cherna*, 184 F.3d at 413 (citing *United States v. Dahlman*, 13 F.3d 1391, 1395 (10th Cir. 1993)). In *Dahlman*, the Tenth Circuit had indeed indicated that an affidavit not specifically incorporated in or physically attached to a warrant cannot cure a lack of particularity. *See id.* But in subsequent cases, the Tenth Circuit has relaxed this requirement, holding that an affidavit not incorporated in or attached to a warrant can be used to demonstrate that a warrant is not constitutionally invalid for lack of particularity, at least where the same officer both produced the affidavit and executed the warrant. *See United States v. Simpson*, 152 F.3d 1241, 1248 (10th Cir. 1998); *United States v. Ortega-Jimenez*, 232 F.3d 1325, 1328-19 (10th Cir. 2000) (same).

The Eighth Circuit likewise has adopted an approach that squares with the District Court's ruling in this case, but is in direct conflict with the Ninth Circuit's decision. In *United States v. Curry*, 911 F.2d 72 (8th Cir. 1990), the court held that where a clerical error caused the warrant to omit any address or description of the place to be searched whatsoever, the warrant was defective for lack of particularity and this defect could not be cured by reference to the original affidavit. Nonetheless, the court allowed the affidavit that had been submitted with the original warrant application to be used to demonstrate the good faith of the officers and upheld the search under *Leon*. In that instance, the court stressed that the application and affidavit both contained the correct address; there was no evidence of bad faith on the part of the officers; the search was executed by the affiant; and the responsibility for the error should lie not with

the officers but with the judge who issued the warrant. *See id.* at 76-77. It is noteworthy that each factor is established in this case as well, yet the Ninth Circuit reached the exact opposite decision on the constitutional issue. The Eighth Circuit has since confirmed its position by reaffirming *Curry* on similar facts. *See United States v. Thomas*, 263 F.3d 805, 808-09 (8th Cir. 2001), *cert. denied*, 534 U.S. 1146 (2002).

Finally, the Third Circuit has taken the side of the Ninth Circuit on the underlying constitutional issue. In explicit reliance on *McGrew*, the Third Circuit has held that a lack of particularity in a search warrant cannot be cured by reference to underlying affidavits that have been placed under seal with the Court. *See Bartholomew v. Pennsylvania*, 221 F.3d 425, 429 (3d Cir. 2000). In those circumstances, the court held, the warrant itself must contain a specific description of the items to be seized to avoid a violation of the Fourth Amendment. *See id.* The court did not discuss the good faith doctrine, but went on to conclude that since no controlling law had so held prior to its decision, the officers would be accorded qualified immunity. *See id.* at 429-30.

The evident result of these decisions is a direct and irreconcilable conflict, which will prove dispositive on the very same claims when they are brought in different courts in different parts of the country. The Third and Ninth Circuits have held that law enforcement officers cannot reference the initial application and affidavit to show their good faith and avoid a constitutional violation in executing a warrant that is insufficiently particular, even though it was approved and issued by a judge. The Fifth, Eighth, and Tenth Circuits, in numerous decisions, have held directly to the contrary. In this case, the Ninth Circuit has reaffirmed the split among the circuits on this issue of real practical importance in day-to-day law enforcement. It is undeniable, therefore, that law enforcement officers and potential plaintiffs throughout the country will continue to have their legal claims resolved inconsistently without some manner of intervention by this Court.

Indeed, on the basis of the Court's square holdings on the

"good faith" doctrine in the *Leon* and *Sheppard* cases, it seems clear enough that the ruling below should be summarily reversed. In *Sheppard*, as here, the plaintiff alleged a violation of his constitutional rights based on the Fourth Amendment. The specific complaint in *Sheppard* was that a warrant to search for controlled substances was insufficiently particular when the accompanying affidavit indicated that the affiant actually wished to search for evidence relating to a homicide investigation. It was undisputed that the issuing judge and the executing officers knew the contents of the affidavit and the focus of the search; indeed, the affiant had pointed out the discrepancy to the judge, who nonetheless approved the issuance of the warrant. *See Sheppard*, 468 U.S. at 985-86. On these facts, this Court concluded that the officers' good-faith reliance on the warrant was objectively reasonable, despite its acknowledged defects. *See id.* at 989. Indeed, as this Court expressly noted in rejecting the constitutional claim in that case:

> This is not an instance in which "it is plainly evident that a magistrate or judge had no business issuing a warrant." . . . Indeed, Sheppard admits that if the judge had crossed out the reference to controlled substances, written "see attached affidavit" on the form, and attached the affidavit to the warrant, the warrant would have been valid.

Id. at 990 n.7. The same is true in the case at hand.

The intersection of the qualified immunity issue with the underlying Fourth Amendment issue makes this case of exceptional importance. In the many states and localities encompassed by the Ninth Circuit, its holding will effectively require law enforcement officers to double-check and second-guess judges who have approved and issued warrants, upon pain of incurring personal liability for monetary damages and losing valuable evidence in criminal trials. That regime is in complete disharmony with the "good faith" doctrine that this Court established in the *Leon* and *Sheppard* decisions.

Finally, the regime of qualified immunity laid down by these court below is untenably strict. At present, various federal

judges sharply disagree about the merits of the underlying constitutional issues applying the Fourth Amendment. Yet law enforcement officers in the Ninth Circuit are now being held personally liable for having to make guesses in gray areas of the law, and not simply for transgressing bright lines. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Petitioner belongs in neither category here. This Court has repeatedly warned the lower courts that public officials "cannot be expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at 562; *see also id.* at 563-65 & nn.8-10. Either summary reversal or a grant of *certiorari* is necessary in this case to reinforce this point to the lower courts once again.

CONCLUSION

Petitioners respectfully request that the decision of the Ninth Circuit be summarily reversed in this case. In the alternative, the petition for a writ of *certiorari* should be granted and the case set for plenary review on the merits of the Fourth Amendment and qualified immunity issues.

Respectfully submitted,

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorney for Petitioner

November 2002

APPENDIX
TABLE OF CONTENTS

PAGE

Opinion of the Court of Appeals, July 25, 2002 ..... 1a

Order and Opinion of the District Court, Oct. 14, 1999 ..... 13a

Search Warrant, Mar. 3, 1997 ..... 26a

Application and Affidavit for Search Warrant, Mar. 3, 1997 ..... 28a

Letter from William K. Suter, Clerk of the Court, to Hon. Theodore B. Olson, Oct. 11, 2002 ..... 36a

APPENDIX A

United States Court of Appeals,
Ninth Circuit.

Joseph R. RAMIREZ; Julia L. Ramirez; Joshua Ramirez; Regina Ramirez,
Plaintiffs-Appellants,
v.
BUTTE-SILVER BOW COUNTY; John McPherson, Sheriff of Butte-Silver Bow County;
Joe Lee, Undersheriff of Butte-Silver Bow County; John Does 1-50, in their
individual and/or official capacities, Defendants,
and
Jeff Groh, Special Agent with The Bureau of Alcohol, Tobacco, and Firearms,
Defendant-Appellee.
Joseph R. Ramirez; Julia L. Ramirez; Joshua Ramirez; Regina Ramirez,
Plaintiffs-Appellants,
v.
Butte-Silver Bow County; John McPherson, Sheriff of Butte-Silver Bow County;
Joe Lee, Undersheriff of Butte-Silver Bow County; Jeff Groh, Special Agent
with The Bureau of Alcohol, Tobacco, and Firearms;
John Does 1-50, in their
individual and/or official capacities,
Defendants-Appellees.

Nos. 99-36138, 00-35955.

Argued Sept. 10, 2001.
Submission Deferred Sept. 10, 2001.
Submitted and Filed March 13, 2002.
Amended July 25, 2002.

Homeowners brought *Bivens* and § 1983 action against federal and county law enforcement officers, alleging that their Fourth Amendment rights were violated. The United States District Court for the District of Montana, Donald W. Molloy, Chief District Judge, granted defendants' motion for summary judgment, and homeowners appealed. Amending its prior opinion, 283 F.3d 985, the Court of Appeals, Kozinski, Circuit Judge, held that: (1) search warrant failed to comply with Fourth Amendment; (2) rank and file officers on search team were entitled to qualified immunity; but (3) leader of search team was not entitled to qualified immunity; and (4) search was not unconstitutional as a privacy violation.

Affirmed in part and reversed in part.

***1024** Vincent J. Kozakiewicz, Boise, ID, and W.G. Gilbert III, Dillon, MT, argued the cause for the appellants.

William W. Mercer, Assistant United States Attorney, Billings, MT, and Brendon J. Rohan, of Poore, Roth & Robinson, P.C., Butte, MT, argued the cause for the appellees. Deanne L. Sandholm, Assistant U.S. Attorney, Helena, MT, assisted on the brief.

Appeals from the United States District Court for the District of Montana, Donald W. Molloy, District Judge, Presiding. D.C. No. CV-99-00017-DWM.

Before: KOZINSKI and GOULD, Circuit Judges, and SCHWARZER, District Judge.[1]

---

1 The Honorable William W Schwarzer, United States Senior District Judge for the Northern District of California, sitting by designation.

ORDER

The Opinion filed March 13, 2002, is amended as follows:

***1025** 1. At page 4170, [283 F.3d 985, 988] line 9 of the slip opinion, replace "*Id.*" with "*Id.* (quoting *United States v. Hillyard,* 677 F.2d 1336, 1340 (9th Cir.1982) (internal quotation marks omitted)).".

2. At page 4171, [283 F.3d at 989] footnote 1, line 8 of the slip opinion, replace "quoting" with "citing".

3. At page 4174, [283 F.3d at 991] lines 11-12 of the slip opinion, replace "qualified immunity because, according" with "qualified immunity. According".

With these amendments, the petition for rehearing is denied and the petition for rehearing en banc is rejected. Fed. R.App. P. 35, 40.

OPINION

KOZINSKI, Circuit Judge.

We consider whether and under what circumstances law enforcement officers who execute a search pursuant to a defective warrant enjoy qualified immunity.

I

Agent Jeff Groh of the Bureau of Alcohol, Tobacco and Firearms ("BATF") received two reports that the Ramirezes kept an automatic rifle, a rocket launcher, a grenade launcher and grenades on their ranch in western Montana. Groh prepared an application for a search warrant and supporting affidavit, and presented them to a magistrate judge who issued the warrant. The application properly described both the place to be searched

and the objects sought. However, the warrant itself omitted the latter information entirely: In the space provided to list the items to be seized, Groh mistakenly typed a description of the Ramirez home.

Groh led BATF agents and members of the county sheriff's department, including Sheriff John McPherson and Undersheriff Joe Lee, in the execution of the warrant. When the officers entered the Ramirez home, only Mrs. Ramirez was present. Groh told her they had a search warrant and were there "because somebody called and said you have an explosive device in a box." The officers found no illegal weapons or explosives, but photographed the home's interior and recorded the serial numbers of the Ramirezes' legal firearms. Mrs. Ramirez tried to call her attorney during the search but could not reach him. As Groh left, he gave Mrs. Ramirez a copy of the defective search warrant; neither the application nor the affidavit were attached. Nothing was seized, and no charges were subsequently filed against the Ramirezes.

The next day, Mrs. Ramirez reached her attorney and faxed him the warrant. The attorney then called Groh and questioned the warrant's validity because of the omitted information. He also demanded a copy of the warrant application and supporting affidavit. Groh replied that the documents were under court seal, but faxed him the page of the application that contained the list of items to be seized.

The Ramirezes sued the officers under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), and 42 U.S.C. § 1983, for violation of their Fourth Amendment rights. The district court granted summary judgment to defendants, holding that there was no constitutional violation and defendants enjoyed qualified immunity in any case. The Ramirezes also brought two other *Bivens* and section 1983 claims, *see* Parts III & IV *infra,*

but the district court ruled against them on those as well. The Ramirezes appeal.

II

A. Was there a Fourth Amendment violation?

To satisfy the Fourth Amendment, a search warrant must describe with ***1026** particularity the place to be searched and the items to be seized. U.S. Const. amend. IV; *United States v. Sayakhom,* 186 F.3d 928, 934 (9th Cir. 1999). The particularity requirement protects the individual from a "general, exploratory rummaging in [his] belongings." *United States v. Lacy,* 119 F.3d 742, 746 n.7 (9th Cir. 1997) (quoting *Coolidge v. New Hampshire,* 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)). It does so both by "limit[ing] the officer's discretion" and by "inform[ing] the person subject to the search what items the officers executing the warrant can seize." *United States v. McGrew,* 122 F.3d 847, 850 (9th Cir. 1997) (emphasis removed).

We addressed the particularity requirement in *McGrew,* where federal agents searched the home of a suspected drug trafficker. The warrant itself did not specify the evidence sought. Rather, in the space provided for that information, it referred to the "attached affidavit which is incorporated herein." *Id.* at 848. However, agents never served McGrew with a copy of the affidavit, either during or after the search. *Id.* at 849.

According to the "well settled law of this circuit," a warrant "may be construed with reference to the affidavit . . . if (1) the affidavit accompanies the warrant, and (2) the warrant uses suitable words of reference which incorporate the affidavit." *Id.* (quoting *United States v. Hillyard,* 677 F.2d 1336, 1340 (9th Cir. 1982) (internal quotation marks omitted)). When officers fail to attach the affidavit to a general warrant, the search is rendered illegal because the warrant neither limits their

discretion nor gives the homeowner the required information. *Id.* at 850.

Appellees concede that the warrant here was facially defective because it provided no description of the evidence sought. It also didn't refer to or incorporate the application or affidavit. Groh attached no documents to the warrant when he served it on Mrs. Ramirez. Nonetheless, appellees argue that *McGrew* does not control and that the search was lawful because Groh's words remedied the defect. According to Groh, he spoke at length with the Ramirezes during the search--Mrs. Ramirez in person, Mr. Ramirez on the telephone--and listed all of the items sought. However, the Ramirezes claim that Groh spoke only to Mrs. Ramirez, and told her simply that the officers sought "an explosive device in a box."

This factual dispute is immaterial: Groh could not have cured the flaw because he lacked the authority to amend the warrant. As a law enforcement officer, Groh was empowered only to execute the warrant. Therefore, he could no more have supplemented it verbally than he could have amended it by crossing out the terms approved by the magistrate and scribbling new ones in the margins. The only way Groh could have remedied the defect in the warrant was to ask a magistrate to issue a corrected version. *McGrew* therefore controls and the warrant failed to comply with the Fourth Amendment.[2]

---

2 Appellees also argue that, because their good faith reliance on the properly completed warrant application would make any seized evidence admissible, *see United States v. Gantt,* 194 F.3d 987, 1005-06 (9th Cir. 1999) (discussing the good faith exception to the exclusionary rule), that good faith precludes a finding that the search violated the Fourth Amendment. *McGrew* forecloses this argument. We held there that if the affidavit "does not accompany the warrant, agents cannot claim good faith reliance on the affidavit's contents." 122 F.3d at 850 (citing *United States v. Kow,* 58 F.3d 423, 428-30 (9th Cir. 1995)).

Our holding is consistent with the goals of the particularity requirement, which went unfulfilled here despite Groh's alleged ***1027** oral statements. First, the absence of a sufficiently particular warrant increased the likelihood and degree of confrontation between the Ramirezes and the police. The presence of a comprehensive and valid warrant "greatly reduces the perception of unlawful or intrusive police conduct, by assuring the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Illinois v. Gates,* 462 U.S. 213, 236, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (internal quotation marks omitted).

Second, the invalid warrant deprived the Ramirezes of the means to be on the lookout and to challenge officers who might have exceeded the limits imposed by the magistrate. "Citizens deserve the opportunity to calmly argue that agents are overstepping their authority or even targeting the wrong residence." *United States v. Gantt,* 194 F.3d 987, 991 (9th Cir. 1999). Such a dialogue is impossible if citizens must rely on officers' verbal representations of the scope of their authority. To stand a real chance of policing the officers' conduct, individuals must be able to read and point to the language of a proper warrant.

Third, permitting officers to expand the scope of the warrant by oral statements would broaden the area of dispute between the parties in subsequent litigation. The parties' disagreement over exactly what Groh said during the search, and to whom he said it, is immaterial because the warrant must contain all authorizations and limitations in writing.

B. Are Defendants Protected by Qualified Immunity?

Law enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances, even if the actions

result in a constitutional violation.[3] *Wilson v. Layne,* 526 U.S. 603, 614, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999); *Marks v. Clarke,* 102 F.3d 1012, 1026 (9th Cir. 1996). What's reasonable for a particular officer depends on his role in the search. Because searches often "require[ ] cooperation and division of labor," *Guerra v. Sutton,* 783 F.2d 1371, 1375 (9th Cir. 1986), officers' roles can vary widely. Typically, only one or a few officers plan and lead a search, but more--perhaps many more--help execute it. The officers who lead the team that executes a warrant are responsible for ensuring that they have lawful authority for their actions. A key aspect of this responsibility is making sure that they have a proper warrant that in fact authorizes the search and seizure they are about to conduct. The leaders of the expedition may not simply assume that the warrant authorizes the search and seizure. Rather, they must actually read the warrant and satisfy themselves that they understand its scope and limitations, and that it is not defective in some obvious way. *See United States v. Leon,* 468 U.S. 897, 922-23, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (search pursuant to a warrant is invalid if no reasonable officer could have believed the warrant was valid). The leaders of the search team must also make sure that a copy of the warrant is available to give to the person whose property is being searched at the commencement of the search,[4] and that such copy has no missing pages or other obvious defects.

***1028** Line officers, on the other hand, are required to do much less. They do not have to actually read or even see the warrant; they may accept the word of their superiors that they

---

3 While the Ramirezes sued the federal officers under *Bivens* and the county officers under section 1983, "the qualified immunity analysis is identical under either." *Wilson v. Layne,* 526 U.S. 603, 609, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999).

4 We note that in this case Agent Groh did not serve a copy of the warrant on Mrs. Ramirez until after the search was completed. Of course, this was much too late. *See Gantt,* 194 F.3d at 1000-01.

have a warrant and that it is valid. *Guerra,* 783 F.2d at 1375; *Marks,* 102 F.3d at 1029-30. So long as they "ma[k]e inquiry as to the nature and scope of [the] warrant," *Guerra,* 783 F.2d at 1375, their reliance on leaders' representations about it is reasonable. *Id.; Marks,* 102 F.3d at 1029-30. The line officers here acted reasonably: They were told that a warrant had been obtained and learned through an advance briefing what items could be seized. *Guerra,* 783 F.2d at 1375; *Marks,* 102 F.3d at 1030. Because they were not required to read the warrant, the line officers conducting this search cannot reasonably have been expected to know that it was defective.

The Ramirezes argue that none of the officers enjoy qualified immunity because, under *McGrew,* all of them--leaders and line officers alike--should have known that the defective warrant made the search illegal. *McGrew,* 122 F.3d at 850 n.5. But *McGrew* said nothing about the different duties of leaders and line officers. We held only that "[i]t is the *government's* duty," not the duty of any particular officer, to serve a sufficiently particular warrant. *Id.* at 850 (emphasis added). Because we were reviewing the denial of a motion to suppress, we had no occasion to address the allocation of responsibilities between leaders and the rank and file.

The record identifies only Groh as the leader of the search. He received two reports of illegal weapons, obtained and served the warrant, conducted the pre-search briefing and supervised the search itself. However, he neglected to check the warrant for errors. The presence of errors in a warrant does not automatically deprive search leaders of immunity. The question is whether the defects are such that they would have been noticed by a reasonably careful officer who read the warrant before executing it. *Cf. Arnsberg v. United States,* 757 F.2d 971, 981 (9th Cir. 1985) (holding that a search conducted pursuant to a facially flawed warrant did not violate the Fourth Amendment because "the discrepancy [was] not a serious

one"). Even the most careful proofreaders let mistakes slip by, especially when checking their own work.

Nevertheless, Groh is not entitled to qualified immunity. According to his own affidavit, he did not read the warrant after the magistrate issued it and before he began the search. Had he done so, he would surely have realized that it did not contain a list of items to be seized and was therefore facially defective. He would then have been able to correct the error before going forward with the search. In most cases, "an officer cannot be expected to question the magistrate's . . . judgment that the form of the warrant is technically sufficient." *Leon*, 468 U.S. at 921. But "the officer's reliance on [that judgment] must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.* at 922-23 (citation omitted). No reasonable grounds exist here: The warrant was "so facially deficient . . . in failing to particularize the place to be searched or the things to be seized" that, had Groh read it, he could not "reasonably [have] presume[d] it to be valid." *Id.* at 923.

It is possible that Groh shared authority over the search with other officers, such as Sheriff McPherson and Undersheriff Lee. However, nothing in the record indicates this was the case. Therefore, all officers except Groh are protected by qualified immunity.

***1029 III**

The Ramirezes also appeal the dismissal of their claim that the officers violated their right to privacy as protected by the Fifth and Ninth Amendments. This claim has two parts. First, the Ramirezes argue that the officers violated their right to privacy by notifying the media of the search immediately before it was executed. They claim that the resulting publicity damaged their standing in the community.

Although the Ramirezes present this claim as one for invasion of privacy, the circumstances of the search show that it is actually a defamation claim. Nothing in the record suggests that the media gained access to the Ramirez property. Whatever information the media obtained during the raid was gathered from the road adjacent to the ranch, where any member of the public could have observed the goings on. *Cf. Hanlon v. Berger*, 526 U.S. 808, 809-10, 119 S. Ct. 1706, 143 L. Ed. 2d 978 (1999) (holding that police violated the Fourth Amendment by allowing a media crew to accompany them onto the premises and observe a search); *Wilson*, 526 U.S. at 614, 119 S. Ct. 1692, 143 L. Ed. 2d 818 ("[I]t is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant . . . ."). Therefore, the only harm that the Ramirezes can show they have suffered is reputational injury, from which the Constitution offers no protection. *Siegert v. Gilley*, 500 U.S. 226, 233-34, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991).

The Ramirezes also argue that the search itself violated not only their right to be free from unreasonable searches and seizures, but also their right to privacy. "[C]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Armendariz v. Penman*, 75 F.3d 1311, 1320 (9th Cir. 1996). However, the Supreme Court has held that plaintiffs cannot "double up" constitutional claims in this way: Where a claim can be analyzed under "an explicit textual source" of rights in the Constitution, a court may not also assess the claim under another, "more generalized," source. *Graham v. Connor*, 490 U.S. 386, 394-95, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (analyzing claim under Fourth Amendment but not under substantive due process); *see also Hufford v. McEnaney*, 249 F.3d 1142, 1151 (9th Cir. 2001) (analyzing claim under First Amendment but not under substantive due process); *Armendariz*, 75 F.3d at 1319 (analyzing claim under Fourth and Fifth Amendments but not under substantive due process). Here, because the Fourth

Amendment supplies an explicit textual source of constitutional protection against unlawful searches, that Amendment, and not the more general right to privacy, governs the constitutionality of the search.

IV

Finally, the Ramirezes appeal the dismissal of their claim that each of the officers is liable as a bystander for failing to intercede and prevent his co-defendants' constitutional violations. *See United States v. Koon,* 34 F.3d 1416, 1424-25 (9th Cir. 1994), *rev'd on other grounds,* 518 U.S. 81, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996). The district court dismissed this claim on the basis of its holding that no constitutional violation existed.

As to the line officers, this claim is foreclosed by our ruling that they had no duty to read the warrant and therefore could not have known that the warrant was defective. They cannot therefore reasonably be held liable for failing to intercede. As to Groh, it is clear from the record that he was not aware that the warrant was defective until long after the search was completed,***1030** when he spoke to the Ramirezes' attorney. Groh cannot be held liable for failing to stop a search he did not know was illegal.

AFFIRMED in part and REVERSED in part. No costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ, JOSHUA RAMIREZ AND REGINA RAMIREZ,	)	CV 99-17-BU-DWM
Plaintiffs,	)	
vs.	)	ORDER
COUNTY OF BUTTE-SILVER BOW; JOHN McPHERSON, SHERIFF OF BUTTE-SILVER BOW COUNTY; JOE LEE, UNDERSHERIFF OF BUTTE-SILVER BOW COUNTY; JEFF GROH, SPECIAL AGENT WITH THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, and JOHN DOES 1-50, named in their individual and/or official capacities,	)	
Defendants.	)	

Before the Court is the motion of AFT Agent Jeff Groh to dismiss Plaintiffs' claims against him or, in the alternative, for summary judgment on the basis of qualified immunity.

This case stems from the execution of an admittedly facially defective search warrant at the home of the Ramirez family on

March 4, 1997. Agents of the Bureau of Alcohol, Tobacco, and Firearms and law enforcement employees of Butte-Silver Bow County participated in the search. Plaintiffs seek damages for violations of their First, Fourth, Fifth, and Ninth Amendment rights against the Federal Defendants (AFT Agent Jeff Groh and John Does 26-50) and for violations of their First, Fourth, Fifth, and Fourteenth Amendment rights against the State Defendants (Butte-Silver Bow officers). The present motion to dismiss or, in the alternative, for summary judgment, was brought by the Federal Defendants and argued on the grounds that the complaint failed to state an actionable claim for relief and that there is qualified immunity for the actions involved.

1. Factual Background

In May, 1996, ATF Agent Jeff Groh received reports of automatic weapons fire and of the presence of grenades at and around the Ramirez home. Search Aff. at 2. He also received a report from a concerned building contractor who had seen automatic weapons in and around the Ramirez home while he was building a 3-foot storage space into the floor of Ramirez' bedroom. Search Aff. at 1. Agent Groh contacted Ramirez, and Ramirez agreed to meet Agent Groh and show him around the premises. Agent Groh observed a Norinco MAC-90, not altered for automatic fire, and an upstairs ammunition room with reloading presses and other reloading components. Agent Groh saw no hand grenades or automatic weapons. He did not look in closets or in any rooms other than the upstairs bedroom/reloading room. Nor did he look under the floor in Ramirez' bedroom. The visit ended amicably. Search Aff. at 2.

In February, 1997, Undersheriff Joe Lee of Butte-Silver Bow County contacted Agent Groh about Ramirez. An ex-Marine and friend of the Ramirez family had reported seeing an AK-47, "blooper" grenades, a military-type grenade launcher,

and "some sort of rocket launcher" in one or more of his frequent visits to the Ramirez home.[1] Search Aff. at 2-3.

Based on this information, Agent Groh applied for a search warrant on March 3, 1997. The Search Warrant issued on that date inaccurately lists "[a] single dwelling residence two story in height which is blue in color . . ." as the item to be seized. The Application and the Affidavit both state that the agents were looking for "any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers."

While executing the warrant during the search, Agent Groh allegedly orally described the items involved in the search warrant to Judy Ramirez and to Joseph Ramirez. Joseph Ramirez was not present but spoke with Agent Groh on the telephone. Groh Aff. ¶ 7. At oral argument, Ramirez did not dispute this allegation. The Agent alleges that he also told the agents participating in the search of its object. Groh Aff. ¶ 6. Ramirez does not dispute this allegation. When the search was over, Agent Groh gave Judy Ramirez a copy of the Search Warrant describing the two-story blue house as the item to be seized. Groh Aff. ¶ 8. The Application and Affidavit were not attached to the material he gave her. The agents found nothing in their search. No charges were brought against any member of the Ramirez family. However, a media crew stood just outside the Ramirez' property and apparently videotaped the agents' activities during the search.

---

1 This informant was charged with a felony in 1994, resulting in a misdemeanor conviction. Agent Groh mistakenly informed Judge Holter that the friend had only misdemeanor arrests in Minnesota, California, and Washington, the most recent being in 1989. Plaintiffs do not contend that this mistake is evidence of Agent Groh's intent to do them harm.

The day after the search, the Ramirez' counsel demanded a copy of the Search Application and Supporting Affidavit. Agent Groh allegedly then sent to Plaintiffs' counsel the face page of the Application describing the items to be seized. Groh Aff. ¶ 8. Groh did not send the entire application, as that document remained under seal by court order until October 1998. Since the search, Plaintiffs allege they have been subjected to "unwanted stares in public, unwanted publicity and damage to their reputation" and the termination of their accounts at Norwest Bank.

Ramirez filed a complaint against the ATF agents and against the sheriff and undersheriff of Butte-Silver Bow County on March 4, 1999, alleging violations under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

The Federal Defendants now move to dismiss for failure to state a claim or, in the alternative, for summary judgment based on qualified immunity. I find the motions are well-taken.

2. Failure to State a Claim

A. Do Plaintiffs state a claim under the Fifth or Ninth Amendments?

Neither Plaintiffs nor the Court located a case allowing recovery in constitutional tort on a Ninth Amendment theory.[2] Insofar as Plaintiffs' Fifth Amendment theory is a privacy-based theory, the same obstacle appears. Additionally, both the Fifth

2 Plaintiffs' argument is intriguing. Relying on the Montana Constitution's explicit privacy guarantee, they seek to enforce Montana privacy standards against the federal agents who conducted the search. Their claim can succeed only if a Fourth Amendment violation is found, however, because they say the Ninth Amendment violation "occurred because of the Fourth Amendment violation." Pltfs' Brief in Opposition at 7. If the agents could not show solid probable cause under both Federal and Montana standards, the case would be closer.

and Ninth Amendment claims are based on the Court's finding a violation of the Fourth Amendment claim – i.e., Plaintiffs claim that violating the Fourth Amendment violates the Fifth and Ninth Amendments. These claims are therefore superfluous and must be dismissed.

B. Do the Plaintiffs meet the heightened pleading standard for First and Fifth Amendment claims?

Plaintiffs' First Amendment claim involves an allegation that the police had no intent to chill religious expression; Plaintiffs' Fifth Amendment claim might be a substantive due process claim, based on the officers' allegedly enticing the media to attend the warrant's execution by providing false information about the Plaintiffs.[3] Such a claim would require the Plaintiffs to show a "purpose to cause harm unrelated to the legitimate object of arrest [to] satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." County of Sacramento v. Lewis, 118 S. Ct. 1708, 1712-13 (1998). Under Branch v. Tunnell, 14 F.3d 449 (9th Cir. 1994), Plaintiffs are therefore subject to a heightened pleading standard. Here, Plaintiffs make only conclusory allegations. In fact, they state that discovery "may" show that the federal defendants acted with evil intent. This is not sufficient, and Plaintiff's claims based on the First, Fifth, and Ninth Amendment must be dismissed.

3 To the extent this claim is based on common-law tort notions, Plaintiffs must name the United States, not the individual actors. They have not done so.

3. Summary Judgment Based on Qualified Immunity (Fourth Amendment Claim)

A. Is there a genuine factual issue for trial?

Ninth Circuit case law provided guidance as to the kinds of fact questions that can forestall summary judgment based on qualified immunity in a Fourth Amendment Bivens case:

> Where a Fourth Amendment violation is claimed, the factual issues that may preclude a determination of qualified immunity on summary judgment fall into two categories. First, a determination of . . . probable cause requires an inquiry as to the facts and circumstances within an officer's knowledge. These are matters of fact to be determined, where genuine disputes of a material nature exist, by the fact finder. (This determination does not, however, entail an inquiry into the officer's subjective intentions, merely his knowledge.) Second, the determination of what conduct underlies the alleged violation – what the officer and claimant did or failed to do – is a determination of fact. We hold, however, that the determination whether those facts support an objective belief that probable cause . . . existed is ordinarily a question for the court. It is not in itself a factual issue that can preclude summary judgment.

Act Up!/Portland v. Bagley, 988 F.2d 868, 873 & n.3 (9th Cir. 1993) (citations omitted). This inquiry still applies even after Wilson v. Layne, 119 S. Ct. 1692 (1999), and related cases clarified the analysis for qualified immunity claims. This is because no constitutional violation can be established until the conduct constituting the alleged violation is determined.

Here, Plaintiffs do not contest the agents' knowledge as to the statements contained in the affidavit. Nor do they contest Agent Groh's assertion in his affidavit that he informed both

Plaintiffs and the other agents of the objects of the search. As a backstop allegation, Plaintiffs question whether Groh's affidavit was attached to his warrant application or put before Magistrate Holter, but the allegation is conclusory and not supported in any way by the record.

Mendocino Environmental Center v. Mendocino County, ___ F.3d ___, 1999 WL 742710 (9th Cir. Sept. 24, 1999), contains a good example of facts sufficient to defeat qualified immunity summary judgment. There, statements of FBI agents regarding the location of nails scattered by a bomb and of the hole caused by the explosion conflicted with statements of county officers. These facts were material to a determination whether the officers had probable cause to arrest the plaintiffs. No comparable factual disputes emerge from this record. Plaintiffs do not contest the agents' probable cause, except as a backstop allegation in their Statement of Material Issues of Fact; indeed, Plaintiffs have consistently argued that probable cause is irrelevant. Nor do Plaintiffs contest Agent Groh's assertion in his affidavit that he informed Plaintiffs and the other agents of the objects of the search. Thus, no material factual disputes remain to be referred to a jury, and summary judgment is appropriate.

To analyze the Federal Defendants' qualified immunity defense, the Court must first consider whether a constitutional violation occurred. Only if a violation occurred does the analysis progress to question whether the right was clearly established at the time of the violation. See Wilson, 119 S. Ct. at 1697. "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." Id. at 1699 (quoting Anderson v. Creighton, 483 U.S. 635, 639 (1987)).

B. Did a constitutional violation occur?

Plaintiffs argue that, since the warrant stated that a "two-story blue house" was the object of the search, the officers overstepped their authority by opening drawers and cupboards. No two-story house could be found in a drawer or cupboard. Pltfs' Brief in Opposition at 10. Further, Plaintiffs argue that the warrant failed to particularly describe the things to be seized, so that the agents "seized" serial numbers on weapons and took pictures of the weapons in contravention of the warrant's authorization to seize only a two-story blue house. Finally, Plaintiffs argue that the warrant did not authorize a search of the outbuildings surrounding the home.

Because they fail to contest the most crucial facts, Plaintiffs' reliance on United States v. McGrew, 122 F.3d 847 (9th Cir. 1997), is misplaced. McGrew gives no indication that the officers involved in the search provided the residents of the searched home any description of the items to be seized, before, during, or after the search. The McGrew warrant referred to the affidavit's list of items to be seized, but the affidavit did not accompany the warrant. Even after the search, the officers refused to reveal any portion of the affidavit to the home's owners. The Ninth Circuit panel deciding McGrew was faced with a police force that stubbornly insisted the persons whose home was searched had no interest in independently ascertaining the particular description of the place to be searched or items to be seized. Hence, McGrew emphasized:

> "The purpose of the accompanying affidavit clarifying a warrant is both to limit the officer's discretion and to inform the person subject to the search what items the officers executing the warrant can seize." . . . Because the agents never served a copy of the affidavit on McGrew, the second goal was entirely unsatisfied here. Neither, in all likelihood, was the first; this court has

> held expressly that "neither purpose is served" when the affidavit fails to accompany the warrant.

McGrew, 122 F.3d at 850 (quoting United States v. Hayes, 794 F.2d 1348, 1355 (9th Cir. 1986)).

Likewise, in United States v. Kow, 58 F.3d 423 (9th Cir. 1995), the description of items to be seized in both the warrant and the application were overbroad. Id. at 429-30. Thus, the application could not cure the warrant's overbreadth.

By contrast, in this case, Plaintiffs do not contest Agent Groh's assertion that he immediately faxed Plaintiffs' counsel the face page of the application, showing the correct description of items to be seized, when he was notified of the mistake. The warrant did not refer to an accompanying affidavit, so there was no requirement that the affidavit accompany the warrant. See, e.g., United States v. Hillyard, 677 F.2d 1336 (9th Cir. 1982) (holding that search warrant may be construed with reference to application if application accompanies warrant and warrant incorporates application but not requiring application to accompany warrant in all cases).

Moreover, Plaintiffs have not contended that the description in the application was overbroad. They have not denied, even in a conclusory fashion, that they knew what items the officers sought. Plaintiffs have not contended that the officers participating in the search did not know what they were looking for. Thus, this case is distinguishable from McGrew and Kow.

Plaintiffs' argument that the search was overbroad because it extended to the outbuildings also misses the mark. The search of outbuildings in the curtilage of the home is authorized. See, e.g., United States v. Gorman, 104 F.3d 272 (9th Cir. 1996) (holding that a warrant for the home also authorizes search of the curtilage, including sheds, storerooms, and garages); United States v. Vaandering, 50 F.3d 696, 701 (9th Cir. 1995) (warrant

authorizing search of home also authorizes search of vehicles contained in the curtilage).

Finally, this case is comparable to cases in which warrants contain inaccurate addresses. Such warrants do not necessarily violate the Constitution; a violation occurs only if the premises is not sufficiently described to enable officers to locate the correct address or if there is a reasonable probability that the officers will search the wrong house. Compare, e.g., United States v. Turner, 770 F.2d 1508 (9th Cir. 1985), with United States v. Collins, 830 F.2d 145 (9th Cir. 1987).

Thus, Plaintiffs have not established that a constitutional violation occurred.

C. Are the Federal Defendants entitled to qualified immunity?

Even if the constitutional violation did occur,[4] Plaintiffs would still have to overcome Agent Groh's good faith defense to constitutional tort liability. The Supreme Court has made it clear that "[q]ualified immunity shields [agents] from suit for damages if 'a reasonable officer could have believed [the search] to be lawful, in light of clearly established law and the information the [law enforcement] officers possessed.'" Hunter v. Bryant, 502 U.S. 224, 227 (1991) (quoting Anderson v. Creighton, 483 U.S. 635, 641 (1987)). The Court applies the same standard of "objective reasonableness" that it would apply in a suppression hearing. Ortiz v. Van Auken, 887 F.2d 1366, 1368 (9th Cir. 1989).

---

4 The United States conceded at oral argument that the warrant did violate the Constitution. This is not the position it took in its brief. See Federal Defts' Brief at 7-13.

Agent Groh had sufficient probable cause to obtain a warrant. He followed all the established procedures. His information supported a search for the items listed in the application. Magistrate Judge Holter approved the warrant. A reasonable officer who was not aware of the typographical error would believe himself authorized to conduct a search for illegal weapons at the Ramirez' residence.

Plaintiffs' case against the Federal Defendants hinges solely on a typographical error on the face of the warrant, an error undetected by either Agent Groh or Magistrate Judge Holter. Plaintiffs' counsel argued at the hearing that each officer participating in the search of the Ramirez' home had an independent obligation to examine the warrant. Plaintiff has not cited any authority for that proposition, nor can I find cases to support it.

I do not look lightly on the circumstances exemplified by the problem with the warrant in this case. However, constitutional tort liability does not take aim at technical defects unless and until they rise to the level of substantive deprivations. Had Plaintiffs been unaware of the object of Agent Groh's search, they would have alleged that fact in their complaint or at least in their subsequent briefs, particularly in view of Agent Groh's assertion that he informed the Ramirez family of what he sought. They did not do so. They stand instead on the argument that showing probable cause and following established procedures are not relevant to qualified immunity. Federal case law holds otherwise. The Federal Defendants are entitled to qualified immunity for the Fourth Amendment violation alleged by Plaintiffs because Agent Groh acted in an objectively reasonable manner.

Plaintiffs' theory of bystander liability is predicated on the Federal Defendants' responsibility to protect the Ramirez family from violations of their rights. Since I have concluded that the Federal Defendants are entitled to qualified immunity because no violation occurred or because the Federal Defendants had a good faith basis for their actions, I dismiss this claim as well.

Plaintiffs' last remaining claim against the Federal Defendants is stated in their Second Claim for Relief and involves an unknown defendant's contact with the media, enticing them to attend the execution of the warrant. The Supreme Court held in Hanlon v. Berger, 119 S. Ct. 1706, 1707 (1999) (per curiam), that the media's attendance at a search in 1993 could not form the basis for constitutional liability because the law regarding such attendance was not clearly established until May 24, 1999, the date of the decisions in Wilson and Hanlon. Consequently, the officers in this case cannot be held liable for a constitutional violation even if Plaintiffs could establish that one or more of them invited the media to film the search.

Accordingly, IT IS HEREBY ORDERED:

The Federal Defendants' motion to dismiss for failure to state a claim, or, in the alternative, for summary judgment is GRANTED (dkt # 6).

IT IS FURTHER ORDERED that the case against ATF Agent Jeff Groh and John Does 26-50 is DISMISSED with prejudice. The clerk is directed to enter by separate document Judgment in favor of the Federal Defendants and against Plaintiffs in accordance with this order. Each party shall bear its own costs.

The clerk shall notify the parties of the entry of this order and of the entry of judgment in this case.

Dated this 14th day of October, 1999.

/s/ Donald W. Molloy
Donald W. Molloy
United States District Judge

United States District Court
District of Montana

In the Matter of the Search of Joseph Ramirez Moose Creek/Techinna Ranch West Frontage Rd. Divide, Montana	SEARCH WARRANT CASE NUMBER: CR-97-009-GF-RMH

TO: Special Agent Jeff Groh and any Authorized Officer of the United States

Affidavit(s) having been made before me by Special Agent Jeff Groh who has reason to believe that X on the person of or X on the premises known as

> Moose Creek Ranch, Techinna Apostolic Fellowship located off the west frontage road, north of the Moose Creek exit off of Interstate 15 approximately one half to three quarters of a mile.

in the District of Montana there is now concealed a certain person or property, namely

> A single dwelling residence two story in height which is blue in color and has two additions attached to the east. The front entrance to the residence faces in a southerly direction.

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before March 13, 1997 (not to exceed 10 days) the person or place

named above for the person or property specified, serving this warrant and making the search (in the daytime – 6:00 A.M. to 10:00 P.M.) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to undersigned as required by law.

March 3, 1997 at 12:12 P.M.	at Great Falls, Mt.
Date and Time Issued	City and State
U.S. Magistrate Robert Holter	/s/ Robert Holter
Name & Title of Judicial Officer	Signature of Judicial Officer

United States District Court
District of Montana

In the Matter of the Search of Joseph Ramirez Moose Creek/Techinna Ranch West Frontage Rd. Divide, Montana	APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT CASE NUMBER: CR-97-009-GF-RMH

I Special Agent Jeff Groh being duly sworn depose and say:

I am a(n) Special Agent with the Bureau of ATF and have reason to believe that X on the person of or X on the premises known as (name, description and/or location)

A single dwelling residence two story in height, blue in color and has two additions attached to the east. The front entrance to the residence faces in a southerly direction and the residence is located approximately one half mile north of the Moose Creek exit off of Interstate 15 on the west side of the west frontage road. Photograph attached.

In the District of Montana there is now concealed a certain person or property, namely (name, description and/or location)

any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers.

Which is (give alleged grounds for search and seizure under Rule 41(b) of the Federal Rules of Criminal Procedure)

See attachment.

In violation of Title 18 & 26 United States Code, Section(s) 922(o) & 5861

The facts to support the issuance of a Search Warrant are as follows:

See attachment.

Continued on the attached sheet and made a part hereof.

X Yes ☐ No

/s/ Jeff Groh
Signature of Affiant

Sworn to before me, and subscribed in my presence

March 3, 1997 at Great Falls, Mt.
Date City and State

U.S. Magistrate Robert Holter /s/ Robert Holter
Name & Title of Judicial Officer Signature of Judicial Officer

Attachment A

My name is Jeff Groh and I am a Special Agent with the Bureau of Alcohol, Tobacco and Firearms. I have been employed by the Bureau for approximately seven and one-half years and have been stationed in Helena, Montana, since September of 1989. Prior to being employed with the Bureau, I was a Corporal with the DuPage County Sheriff's Police in the Chicago, Illinois, area for approximately four and one-half years. In my capacity as an AFT Agent, part of my duties include investigating the illegal possession of explosive devices by individuals. Since 1995 your affiant has been aware of an individual by the name of Joseph Ramirez who resides in Silver Bow County with his wife and children. The name of the ranch on which Joseph Ramirez and his family reside has been known to be called the Moose Creek Ranch and the Techinnah Fellowship. Your affiant has been made aware of the following facts.

A contractor working on an addition at the Ramirez residence in late 1995 and early 1996 contacted authorities and stated that he has heard automatic weapons fire coming from the area of the Ramirez residence on numerous occasions. The contractor also stated that he has seen AK-47-type firearms in the Ramirez residence and that they are located in upstairs bedrooms. The AK-47 may be easily converted from semi-automatic to fully automatic. The contractor further stated that he has observed what appeared to him to be MAC-10- or MAC-11-type firearms along with shoulder holsters for the firearms. These items were observed in an upstairs bedroom. Next to this bedroom is a bedroom with "a lot of ammunition in all calibers" stacked on shelves which are attached to the walls of the bedroom.

The contractor went on to say that in the living area on the first floor is a coffee table constructed of wood with a display-type glass case as the table top. Inside the glass-cased table this contractor observed a hand grenade and several handguns. The contractor stated that Joseph Ramirez speaks openly about his

possession of firearms. The contractor has observed all of the Ramirez family members, including juveniles, carrying firearms around their house and around the property. The contractor further stated that as part of the addition to the residence is an approximately three-foot storage area under Joseph Ramirez's bedroom on the first floor. The contractor said he did not have any idea what the storage area could be used for, as it is a most unusual space in that it is only three feet in height.

Your affiant investigated these allegations and learned that automatic weapons fire had been heard in the area of the Ramirez residence, had been learned from neighbor's. Your affiant was also able to establish the fact that Ramirez has an acquaintance who legally possess a number of automatic weapons and has on prior occasions fired the automatic weapons while at the Ramirez residence. In fact Ramirez has stated that he also has fired those weapons owned by this individual.

In May of 1996 your affiant was contacted by Joseph Ramirez and questioned as to whether or not ATF was investigating him and his family. Your affiant advised Ramirez that there were allegations of automatic weapons fire and possible explosives violations at his residence. Ramirez stated that he had a right to possess firearms and that he has a right to protect his property. Your affiant advised Ramirez that he could possess any legal firearms and requested a meeting with Ramirez. Your affiant advised Ramirez that he could possess any legal firearm. Ramirez then agreed to a meeting with your affiant. The property is approximately 25 minutes south of Butte, Montana, in the Moose Creek area south of Divide and north of Melrose.

Your affiant, along with Det. Jerry Stradinger of the Butte Sheriff's Office, met with Ramirez at his residence. Ramirez advised your affiant that he was non-violent and considered the right to possess firearms at his residence was his constitutional right. Your affiant spoke with Joseph for approximately 20

minutes and was allowed to look in the upstairs section of the residence. Your affiant observed a bedroom which appeared to be used for a reloading of ammunition room. The room contained reloading presses and the components for reloading ammunition. Also observed were two shelves containing numerous rounds of ammunition which were stacked on the shelves. In an adjoining room a Norinco MAK-90 was observed which had a folding stock. I observed the firearm which did not appear to be altered to fire fully automatic.

We then went back down to the living quarters where your affiant observed a wooden glass case coffee table. Your affiant observed a knife, a .45 caliber pistol, and some other items inside the glass case. Your affiant then spoke with Ramirez about the legalities of possessing fully automatic firearms and explosive devices. Your affiant did not observe any types of hand grenades or other explosives. It should be noted that your affiant did not enter any closet areas or other rooms in the residence prior to departing. Ramirez also has a storage space located under his bedroom which was not searched.

On February 12, 1997, your affiant was contacted by Undersheriff Joe Lee of the Butte-Silver Bow Law Enforcement Agency reference Joseph Ramirez. Undersheriff Lee advised your affiant that he had received further allegations about Joseph Ramirez and an allegation of illegal explosive possession. Undersheriff Lee stated that he had been contacted by a concerned citizen who had been a friend of Ramirez since the spring of 1996 and had moved away from Montana in early October of 1996. The concerned citizen stated that he had become friends with the Ramirez family and had visited with Ramirez with some regularity at least three or four times a week.

The concerned citizen stated that he had observed the Ramirez children at the Moose Creek ranch carrying semi-automatic firearms around the ranch. The concerned citizen stated to

Undersheriff Lee that he has observed an AK-47 and a military-type grenade launcher in the Ramirez residence. The concerned citizen was chided by the Ramirez family for not wanting any part of these firearms or explosives as he does not like firearms and did not want to be around them.

Your affiant then contacted the concerned citizen on or about February 26, 1997, via telephone and spoke with him reference his observations. The citizen stated that he had spent approximately two years in the U.S. Marines and is aware of military ordinance and its capabilities. He stated that he had observed a homemade wooden box with rope handles in the closet in a downstairs bedroom. The bedroom is located to the east of the family room which contained the glass cased coffee table. Ramirez apparently was moving some boxes from this bedroom into his bedroom and requested the assistance of the citizen. It should be noted that Joseph Ramirez's son Joshua and a ranch hand by the name of Paul Bence were also present in the room.

As boxes were moved out of the closet, the citizen noticed this wooden box which contained approximately 24 grenades which are to be launched from a military grenade launcher. These grenades are commonly referred to as "bloopers." The citizen then observed the grenade launcher and some sort of a rocket launcher in the same closet. The rocket launcher would be utilized for a surface-to-air strike capability.

The citizen stated that Ramirez and the other occupants of the room appeared to have forgotten that the grenades were in the closet when they requested his assistance. The citizen asked Joseph why he needed the grenades, but neither Joseph or anyone in the room answered. The citizen stated that the feeling in the room became quite tense, and he again questioned Ramirez as why he needed grenades. Ramirez again did not reply and simply removed the launchers and the grenades from the closet area and placed them in his (Joseph's) room. None of

the other individuals in the room commented on the items, and the topic was not discussed again. The citizen felt that Ramirez had possessed these types of weapons for some time lending reason to the fact they let the citizen into the area.

The citizen said he became concerned about the incident and spoke to his wife about the explosives he had observed. He further stated that following the incident Ramirez attempted unsuccessfully to gain more of the citizen's confidence in order to prevent the citizen from contacting authorities. Ramirez finally advised the citizen that he was tired of the citizen questioning him about his beliefs and the activity at the Ranch. After this conversation with Ramirez, the citizen never returned to the Ranch.

The citizen said he did not tell authorities about the incident as he did not feel it was his place to do so. It was not until January that he spoke to an acquaintance of Ramirez. She told him that one of the women residing at the Ranch had moved farther away from the Ramirez residence and that the "situation" at the Ranch was "deteriorating." The citizen then stated that he felt compelled to contact authorities to at least determine if those items were still in Ramirez's possession. The citizen saw a faxed copy showing the same type of grenades your affiant believed were observed in the bedroom. The citizen identified the 40mm, M-397-type grenade as being the same type of grenades he observed in the residence.

Your affiant checked the reliability of the concerned citizen and found that he does has had prior misdemeanor arrests in Minnesota, California, and Washington State, the last of which was in 1989. The citizen stated that his reason for leaving the area was not because of his relationship with Ramirez, but that he wanted to live in a more suitable climate because of his family and his employment.

Det. Stradinger and Undersheriff Lee contacted another individual reference Ramirez and his alleged possession of illegal weapons. This individual said he believes Ramierz is paranoid of authorities. The individual had, for some time, been aware of a rocket launcher being possessed by Ramirez at the Ranch, although he had never seen it.

Your affiant contacted the NFA branch of ATF in an effort to determine if any explosives devices were registered to Joseph Ramirez or his wife Judy in the National Firearms registration records with negative results. Unless the devices are registered with the NFA Branch neither Joseph or his wife may lawfully possess automatic weapons or hand grenades.

For the reasons listed above, your affiant respectfully requests a search warrant be issued for the Ramirez residence, any outbuildings, and any vehicles registered to Ramirez which are located on the curtilage of the property. The items your affiant will be searching for will be evidence of violations of 18 U.S.C. 922(o) or Title 26 U.S.C. 5861 which may include:

> automatic firearms, grenades or any other types of explosive devices, to include grenades or grenade launchers, rocket launchers, and any and all receipts or paperwork from firearms or explosive device purchases.

/s/ Jeff Groh
Jeff Groh
Special Agent

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-5011

October 11, 2002

Hon. Theodore B. Olson
Solicitor General
Department of Justice
Washington, DC 20530

Re: Jeff Groh v. Joseph R. Ramirez, et al.
Application No. 02A307

Dear Mr. Olson:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on October 11, 2002, extended the time to and including November 22, 2002.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By
/s/ Clayton R. Higgins, Jr.

Clayton R. Higgins, Jr.
Assistant Clerk